Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERNON WHITE,
Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the
Missouri Court of Appeals
Eastern District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Do a state trial court and state appeals court in an action brought under the Federal Employers Liability Act, 45 U.S.C. §51 *et seq.*, have the authority to determine as a matter of law whether a plaintiff has made a submissible case on all elements of that claim, including duty, foreseeability, breach and causation?

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The Respondent, Union Pacific Railroad Company, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by the Petitioner, Vernon White.

OPINIONS BELOW

On May 26, 1992, after a jury trial, the Circuit Court of the City of St. Louis granted Respondent Union Pacific Railroad Company's ("Union Pacific") Motion for Judgment Notwithstanding the Verdict, and entered judgment in favor of Union Pacific. A copy of that order appears at Appendix A to Petitioner's Petition.

In an opinion filed December 28, 1993, the Missouri Court of Appeals affirmed the judgment of the Circuit Court. A copy of that opinion appears at Appendix B to Petitioner's Petition.

On March 22, 1994, the Missouri Supreme Court denied Petitioner's Application for Transfer. A copy of that order is found at Appendix C to the Petition.

JURISDICTION

In his jurisdictional statement, Petitioner White recites that "[t]he Missouri Appellate Court, Eastern District, reversed a jury verdict in favor of Petitioner in a Federal Employers Liability Act (F.E.L.A.), 45 U.S.C. §51, et seq. case." Petition for Writ of Certiorari at p. 2. This is in error. The Missouri Court of Appeals affirmed the judgment of the Circuit Court in favor of Union Pacific, after the Circuit Court had granted Union Pacific's motion for judgment notwithstanding the verdict. The Missouri Supreme Court then denied Petitioner's Application for Transfer. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257 and Supreme Court Rule 10(1)(c).

STATEMENT OF THE CASE

This is an action for personal injuries pursuant to the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51, *et seq.* Petitioner claimed that in August of 1987 he was injured when he fell from a scaffold ladder that was used to repair a railroad hopper car. Respondent Union Pacific disputed the circumstances of the accident.

Petitioner's statement of the case is incomplete, and in some cases misleading, and Union Pacific therefore provides the following statement.

As of June 12, 1987, Petitioner had been on furlough for several years, when he was asked by Union Pacific to return to work. On that date, pursuant to Union Pacific procedures

regarding employees returning from extended furloughs, White was referred to Dr. Harold E. Donnell for a return-to-work physical examination.

As part of the physical examination process, Petitioner completed a Medical History form. At trial, Petitioner introduced the Medical History form into evidence. In response to questions on that form, Petitioner indicated that he had never had and did not then have "convulsions, spells, fits or epilepsy," and never had and did not then have any "fainting or dizzy spells." He also indicated on the form that there should be no restrictions on his work assignments. Petitioner further responded on the Medical History form that he did not have any physical, mental or emotional condition which might in any way interfere with his safety or the efficient performance of his work. In response to a question on the Medical History form about whether he had consulted or been treated by any physicians, Mr. White also indicated only the following: "Gary W. Sides, D.O. . . . vasovagal syncope angina."

Petitioner also introduced into evidence at trial a portion of the deposition of Dr. Donnell, who conducted the return-to-work physical examination. Union Pacific introduced other portions of that deposition. During the examination, Dr. Donnell asked Petitioner about Petitioner's reference on the Medical History form to vasovagal syncope and Petitioner referred to a single episode of fainting. Petitioner also indicated to Dr. Donnell that he had no complaints about his physical condition. At trial, Petitioner did not deny making these statements to Dr. Donnell. Under the Union Pacific Rules of Physical Examination, an individual was not subject to work restrictions because of a single episode of fainting.

Based on Petitioner's responses to the questions on the Medical History form and his responses to Dr.Donnell's questions, Dr.Donnell reported to the Medical Director at Union Pacific that Petitioner could return to work. Except for the reference to

the single fainting episode, Petitioner never advised Dr. Donnell or anyone else at the railroad of any past medical problems, and did not advise Dr. Donnell or anyone else about any appropriate work restrictions.

Contrary to his negative answers on the Medical History form, in fact Petitioner had a history of physical problems. Without Union Pacific's knowledge, Petitioner had been hospitalized on three prior occasions — in 1979, 1985, and 1986 — for fainting spells, with some indication of seizure activity. These episodes occurred while plaintiff was off duty or on furlough.

After an incident in 1979, Petitioner was treated by a Dr.Lawyer, who recommended to Petitioner that he remain off work while his condition was reviewed. Petitioner was hospitalized in 1985 for blacking out. In 1985, Petitioner indicated to his then treating physician that he had had other fainting spells. In 1986, his physician also supervised Petitioner's hospitalization for fainting and a possible seizure. The 1986 hospitalization was precipitated by an incident in which Petitioner was found in his bed, unconscious, his head rolling and both legs kicking. With regard to the 1986 hospitalization, the admitting diagnosis was possible seizure disorder. Petitioner was eventually diagnosed as having a possible seizure disorder, hypoglycemia or vasovagal syncope.

In 1986, Petitioner's treating physician advised him not to place himself in situations that might be dangerous to him as a result of his medical condition. His physician never released Petitioner to return to work. Neither Petitioner nor any of his treating physicians ever advised anyone associated with Union Pacific about these hospitalizations or any work restrictions.

At trial, Petitioner acknowledged the hospitalizations, and various prior blackouts. Petitioner never explained why he had given the incorrect and misleading responses on the Medical History form or to Dr. Donnell.

On August 26, 1987, Petitioner was assigned to repair the roof of a covered hopper. At the time of this assignment, his assigning supervisor was not aware of Petitioner's medical history. Performance of this job required the use of a portable scaffold ladder, which allowed the carman access to the top of the hopper car on which the repairs were to be performed. There had been no complaints or reports of problems with these scaffold ladders during three prior years of use at Union Pacific.

There were no eye-witnesses to any of the circumstances resulting in Petitioner's injury. At trial, Petitioner testified that he had climbed 8 or 10 feet up the steps of the platform ladder when he began feeling dizzy and cold, and he then blacked out. However, in the accident report he prepared less than three weeks after the accident, Petitioner stated that the accident occurred when he went to step from the scaffold ladder to a ladder on the railcar, lost his balance and fell off the ladder. In that same accident report, Petitioner also stated that he did not know what caused the accident.

Approximately two weeks after the accident, in a history given to a physician, Petitioner stated that as he was stepping from the scaffold ladder to the railroad car ladder, bolts and washers began to spill from his pocket. When he reached out to catch the falling washers, he lost his balance and fell to the ground.

In neither the accident report nor the history given to his physician did Petitioner state that he had felt dizzy or had lost consciousness while on the ladder.

A Union Pacific employee accompanied Petitioner in the ambulance to the hospital. During the ambulance ride, Petitioner stated that he had climbed down the scaffold ladder to obtain some washers and some water, and that, when returning to the ladder, he became very hot and did not remember ever making it back to the scaffolding.

Over Respondent Union Pacific's objection, the case was submitted to the jury on the theories of negligent assignment, in light of Petitioner's medical condition, and a defective scaffold ladder. After a jury verdict in favor of Petitioner, the trial court granted Union Pacific's Motion for Judgment Notwithstanding the Verdict, and entered judgment in favor of Union Pacific. Contrary to the suggestion by Petitioner in his Petition for Writ of Certiorari, the trial court entered judgment notwithstanding the verdict because "the evidence does not support any of the allegations of negligence contained in plaintiff's petition." *See* Appendix A to Petition for Writ of Certiorari.

Petitioner appealed the judgment to the Missouri Court of Appeals, Eastern District. In his brief in the Court of Appeals, Petitioner did not argue that the trial court's judgment violated the Seventh Amendment to the United States Constitution.

The Missouri Court of Appeals affirmed the judgment of the trial court. The Court of Appeals held that, even under the standards applicable to a claim under the FELA, Petitioner had failed to make a submissible case on the element of foreseeability, in light of the Petitioner's repeated misrepresentations regarding his medical history. *See* Appendix B to Petition for Writ of Certiorari. The Court of Appeals stated that "[e]ven when viewed in the light most favorable to plaintiff, the evidence shows that plaintiff repeatedly misrepresented his physical condition to defendant." *See* Appendix B to Petition.

ARGUMENT

I. THE MISSOURI COURT OF APPEALS DID NOT RAISE THE STANDARD OF NEGLIGENCE IN AN FELA CASE, BUT, VIEWING THE RECORD IN THE LIGHT MOST FAVORABLE TO PETITIONER, CORRECTLY CONCLUDED THAT PETITIONER HAD FAILED TO MAKE A SUBMISSIBLE CASE ON ALL ELEMENTS HE WAS REQUIRED TO PROVE TO ESTABLISH LIABILITY UNDER THE FELA.

The Missouri Court of Appeals did not raise the standard for proving negligence in a case under the Federal Employers Liability Act (FELA), 45 U.S.C. §51, *et seq.* Although this Court in *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), held that an employer could be liable under the FELA if its negligence played any part in a plaintiff's injury, the Court in *Rogers* did not relieve an FELA plaintiff of the burden of making a submissible case on all elements required in a claim based on common law negligence. *Richardson v. Missouri Pacific Railroad Company*, 677 F.2d 663, 665 (8th Cir. 1982). A submissible FELA case thus requires proof of foreseeability, duty, breach, and causation. *Gallick v. Baltimore and Ohio Railroad*, 372 U.S. 108, 117, 83 S.Ct. 659, 665, 9 L.Ed.2d 618 (1963); *Inman v. Baltimore and Ohio Railroad*, 361 U.S. 138, 140, 80 S.Ct. 242, 243, 4 L.Ed.2d 198 (1959). In a negligent assignment case, the element of foreseeability must be established by a showing that the defendant knew or should have known that its assignment exposed the employee to an unreasonable risk of harm. *Fletcher v. Union Pacific Railroad Company*, 621 F.2d 902, 909 (8th Cir. 1980).

In affirming the judgment of the trial court, the Missouri Court of Appeals properly applied the above factors to the record before it. The Court of Appeals did not increase Petitioner's

burden of proof, but simply rejected Petitioner's apparent contention that an FELA plaintiff no longer must prove negligence and causation and that the state courts have no authority to determine whether an FELA plaintiff has made a submissible case. Viewing the evidence in the light most favorable to plaintiff, the Court of Appeals properly concluded that Petitioner's own evidence established that Petitioner had repeatedly misrepresented and mislead Defendant with regard to Petitioner's medical history and condition.

The thrust of Petitioner's negligent assignment claim was (1) that, prior to the accident in question, Petitioner had a history of fainting spells or blackouts, including at least one incident involving convulsions; (2) that Union Pacific knew or should have known of this condition; and (3) that Union Pacific improperly assigned Petitioner to a job which put him at risk. As he did in his briefs on appeal, Petitioner again points to the Medical History form completed by him as evidence of notice, which form contained a reference to Dr. Sides and vasovagal syncope. Petitioner implicitly contends that the Court of Appeals should have disregarded the fact that, on that same Medical History form introduced by Petitioner, Petitioner answered "no" when asked (1) whether he had ever had any fainting or dizzy spells, (2) whether he had ever had any epilepsy, fits or spells, (3) whether he had any physical condition which might effect his safety and efficient performance of his work, and (4) whether he believed he should be assigned any work restrictions. Each of Petitioner's answers to these questions was false. Moreover, it was undisputed that Petitioner completed this form and that the form reflected his answers to these questions.

Contrary to Petitioner's apparent suggestion, the Missouri Court of Appeals was not required to ignore Petitioner's own evidence that established his repeated affirmative misrepresentations regarding his medical condition and history. The Medical History form was one of Petitioner's exhibits. Apparently

Petitioner would have had the Court of Appeals review and consider only those portions of the exhibit which he claims are favorable, while ignoring those portions of that same exhibit which prove his misrepresentations and preclude a finding of liability. Petitioner cannot pick and choose from his own exhibit. To the contrary, Petitioner was bound by his own exhibits and admissions.

Petitioner also ignores, and apparently suggests that the Missouri courts should have ignored, the testimony of Dr. Donnell on the issue of notice, even though Petitioner offered Dr. Donnell's videotape deposition as evidence at trial. Dr. Donnell's testimony on these issues was uncontradicted, and plaintiff is bound by it. *E.g.*, *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 906-907 (Mo. App. 1990) (a party is bound by the uncontradicted testimony of his own witnesses); *Waters v. Barbe*, 812 S.W.2d 753, 758 (Mo. App. 1991); *Springfield General Osteopathic Hosp. v. West*, 789 S.W.2d 197 (Mo. App. 1990). Dr. Donnell testified that when questioned Petitioner had referred to only a single episode of fainting. Under applicable Union Pacific medical rules, a single episode of fainting does not call for work restrictions.

Petitioner was obligated to prove notice and establish foreseeability. The trial court and Court of Appeals were obligated to assess the record to determine what evidence of notice was presented by Petitioner. The Court of Appeals was not required to disregard petitioner's own evidence which bars him from recovery. Petitioner's Medical History form, as well as the testimony of Dr. Donnell, constituted Petitioner's evidence of notice. As the Court of Appeals properly recognized, that evidence, even when taken in the light most favorable to Petitioner, also established that Petitioner had affirmatively misrepresented to Union Pacific both the existence and severity of his condition.

Nothing in the holding of the Missouri Court of Appeals suggests that that Court either "ignored legal precedent," made "this Court's ruling in *Rogers* moot," or set forth "a new and unfair standard . . . for proving negligence in a FELA case." Petition for Writ of Certiorari at p. 12. The Court of Appeals' holding reflects a careful consideration of the specific facts of this case and a proper recognition that an FELA plaintiff must still prove all of the elements of a negligence claim to recover under the FELA.

II. IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT, THE MISSOURI COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW AND DID NOT REWEIGH THE EVIDENCE OR CONSIDER THE EVIDENCE OF RESPONDENT.

The standard of review for an order granting a judgment notwithstanding the verdict is the same in an FELA as it is in other negligence cases arising under state law. *Compare Jamrozik v. M.T. Realty & Investment Corp.*, 843 S.W.2d 394 (Mo.App. 1992), with *Glover v. Atchison, Topeka & Santa Fe Rwy.*, 841 S.W.2d 211 (Mo. App. 1992). As reflected in its opinion, the Court of Appeals properly reviewed the evidence in the light most favorable to Petitioner and awarded him all reasonable beneficial inferences that could have been drawn from that evidence. *Jamrozik*, 843 S.W.2d at 395.

The Court of Appeals did not reweigh the evidence or improperly consider Union Pacific's evidence. Again, Petitioner ignores the fact that the source of the evidence of his affirmative misrepresentation of his medical history was Petitioner's own documents and witnesses. The Medical History form, on which Petitioner relied as notice to defendant of plaintiff's medical condition, contained repeated affirmative misrepresentations by Petitioner about his condition. These misrepresentations continued in Petitioner's meeting with Dr.Donnell, whose deposition

testimony was also offered by Petitioner. Contrary to Petitioner's argument, the Court of Appeals was not required to disregard Petitioner's own evidence which undermined Petitioner's claim. Again, Petitioner was bound by this evidence. *E.g.*, *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 906-907 (Mo. App. 1990) (a party is bound by the uncontradicted testimony of his own witnesses); *Waters v. Barbe*, 812 S.W.2d 753, 758 (Mo. App. 1991); *Springfield General Osteopathic Hosp. v. West*, 789 S.W.2d 197 (Mo. App. 1990).

The evidence on which the Court of Appeals relied was Petitioner's own and was uncontradicted. There was no improper reweighing of the evidence, assessment of credibility, or substitution of the court's judgment for the jury's. The Court of Appeals' recognition of Petitioner's affirmative misrepresentations regarding his medical history is fully consistent with the applicable standard of review.

III. THE HOLDING OF THE MISSOURI COURT OF APPEALS IS FULLY CONSISTENT WITH *ROGERS* AND DID NOT IMPROPERLY DEPRIVE PETITIONER OF ANY CLAIMED RIGHT TO A JURY DETERMINATION.

This case presents no important question of federal law. The issue is simply whether Petitioner made a submissible case in his claim of negligence against Union Pacific. The Missouri Court of Appeals properly applied the appropriate standard of negligence under the FELA and the appropriate standard of review to the facts of this case. Those facts established that Petitioner repeatedly and affirmatively misrepresented his medical history and then tried to bring a claim against Union Pacific because it allegedly failed to protect him from the condition about which he had consistently mislead defendant. Neither *Rogers v. Missouri Pacific Railroad Company* nor any other case cited by Petitioner gives an FELA plaintiff an absolute right to a jury determination,

regardless of the inadequacies of that plaintiff's evidence. Neither *Rogers* nor any other case cited by Petitioner strips a court of its right and obligation to assess the evidence and determine whether an FELA plaintiff has made a submissible case on all required elements of a claim. Neither the trial court nor the Court of Appeals have usurped the "fact-finding function" of the jury in this case. Rather, each has merely exercised its judicial function in determining whether a party's own evidence precludes recovery. The record here fully supports the courts' holdings.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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